

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1484

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET No. T-3354

ANTHONY BARATTA,
APPELLANT,

-V-

UNITED STATES OF AMERICA,
APPELLEE.

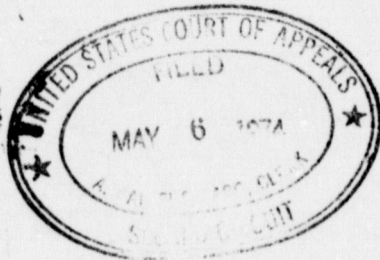
APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK (Civil action No. 73-5444)

BRIEF AND APPENDIX

This brief prepared and
filed by:

Anthony Baratta

Anthony Baratta, pro/se



ANTHONY BARATTA,

-V-

APPELLEE.

DOCKET No.

BRIEF OF APPELLANT

This is an appeal from an order of the United States District Court for the Southern District of New York denying the application for the writ of Habeas Corpus pursuant to Title 28 U.S.C. Section 2255 of Anthony Baratta filed in Civil Action No. 73-5444. The Court's order was entered on February 28, 1974, and a timely notice of appeal was filed by appellant on March 29, 1974.

The District Court's order denying defendant's application for relief pursuant to Title 28 U.S.C. Section 2255 may be briefly summarized as follows:

" Both of defendant's arguments concerning the sufficiency of the evidence as to his control of the heroin and the trial court's charge to the jury were raised by defendant on appeal; both were rejected. Once a matter has been decided adversely to a defendant on direct appeal, it cannot be relitigated in a post-conviction collateral attack."

Accordingly, the District Court denied defendant's motion, it is from this order of denial that defendant-appellant now appeals.

POINT 1

THE EVIDENCE ABDUCED AT TRIAL DID
NOT CONSTITUTE A VIOLATION OF Sec.
174 OF TITLE 21.

ARGUMENT

Contrary to the District Court's opinion, on direct appeal of the instant case this Court found that the evidence was sufficient to sustain the convictions of both of the co-defendants, Monastersky and Sancinella, but failed to rule on the same issue as to the defendant herein. The Court reached this conclusion by applying the test enunciated in UNITED STATES -v- JONES, 308 F2d 26 (2d Cir. 1962) saying:

" A working relationship or a sufficient association with those having physical custody of the drugs so as to enable one to assure their production, without difficulty, to a customer as a matter of course...constitutes possession," but on the other hand, " A casual facilitator of a sale, who knows a given principal possess and trades in narcotics, but who lacks the working relationship with the principal that enables an assurance of delivery, may not be held to have dominion and control over the drug delivered and cannot be said to have possession of it."

Applying this two pronged test to the case at bar it is clear that defendant's case comes within the confines of the latter prong. A case analogous to the present one, both in fact and in law, is HERNANDEZ -v-

UNITED STATES, 300 F2d 114 (9th Cir. 1962), there the Court held that the possession of conspirator A cannot be imputed to conspirator B for the purpose of permitting the statutory inference of importation and knowledge of importation to be drawn against conspirator B. See also JEFFERSON -v- UNITED STATES, 340 F2d 193 (9th Cir. 1965)

This is especially so where, as here, it is unmistakably clear that defendant is alleged to have been a mere delivery man, UNITED STATES -v- BARATTA, at page 221, and only acting for the principal and thus transporting. The record is devoid of a basis, factual or otherwise, that would permit the case of defendant to be submitted to the jury on either of the two counts of the indictment. Since (a) the record is bare of any direct evidence that any of the defendants named in the indictment had actual knowledge of illegal importation, as this Court pointed out at page 219, and (b) it is undisputed that defendant's presence at the 292 Club was that of a delivery man. Hence, the relationship was not enough to constitute such possession as would support the statutory inference. Defendant's conviction then rests solely on the statutory inference arising from alleged possession which has nothing to do with violating Section 174, which does not make it an offense merely to possess or transport or conceal or deal in heroin or contraband, e.g., UNITED STATES -v- BAGBY, 451 F2d at page 928, (9th Cir. 1972)

POINT 11

THE INSTRUCTIONS AS TO THE OFFENSE CHARGED
WERE SO CONFUSING AND SO CLEARLY ERRONEOUS
AS TO AMOUNT TO A DIRECTED VERDICT OF GUILTY.

ARGUMENT

On direct appeal defense counsel urged that the trial Court's charge was erroneous in the following four (4) respects: (1) the trial judge erred in charging the jury as to the first Count of the indictment in the language

of the general conspiracy statute, Title 18 U.S.C. Section 371, rather than in the language of the conspiracy portion of Title 21 U.S.C. Section 174, under which the defendants were indicted; (2) in his charge on the conspiracy Count the trial judge failed to instruct the jury that knowledge of illegal importation of the narcotics is an essential element of the crime of conspiracy under Section 174; (3) during his explanation to the jury on the statutory inference of knowledge of illegal importation arising from possession the Court used the statutory language: "unless the defendant explains the possession" in derogation of the defendant's 5th Amendment rights; (4) the Court used language which would allow the jury to employ a preponderance of evidence standard in determining the guilt or innocence of defendant.

This Court noted at page 225, that although the charge was erroneous in several respects, the errors were not sufficiently egregious or likely to have caused prejudice to warrant reversal when, save as to item (2), no adequate objection was made.

The basic issue here is the trial Court's failure to instruct the jury on the crucial elements of illegal importation and defendant's knowledge thereof once possession has been established. At this juncture the trial judge had already erroneously restricted the jury's consideration of the evidence, as well as giving a distorted picture of the problem which the jury had to resolve. As the Court in ROE -v- UNITED STATES, 287 F2d 435 (5th Cir. 1961) said:

" No fact, not even an undisputed fact, may be determined by the judge. The plea of not guilty puts all in issue, even the most patent truths. In our federal system, the trial court may never instruct a verdict either in whole or in part.

Herein, defendant asserts that he cannot be penalized for defense counsel's lack of diligence in failing to properly object to the trial judge's charge as it relates to item (2), and as such this issue was proper-

ly before the District Court under the rationale of KAUFMAN -v- UNITED STATES, 394 U.S. 217 (1969) since the issue was not raised in the earlier proceedings and the federal trial or Appellate Court did not rule upon such claims.

Defendant best relies upon the rationale expressed by the Court in UNITED STATES -v- BAGBY, supra. there the Court held that Section 174, does not make it an offense merely to possess or transport or conceal or deal in heroin or contraband. There must be, or have been, importation, and there must be knowledge of that fact. The Court said that while it may be that Congress could have made mere possession of heroin an offense, it did not do so in Section 174. Both elements remain essential to a conviction under Section 174 and both must be proved by the prosecution beyond a reasonable doubt. The BAGBY Court said: " to sum up, we hold that where a Section 174 charge does not involve actual importing or bringing in or a conspiracy to import or bring in, but relates only to activities taking place in the United States the courts must adhere to the following:

(1) Both the fact of illegal importation of the narcotic and the defendant's knowledge thereof are essential elements of the offense and the jury should be so instructed.

(2) Where there is evidence of possession, the court can instruct that the law permits the jury to infer both importation and the defendant's knowledge. The court, however, must make it clear that the jury is not required to draw either inference, and that the permissible inferences do not shift the burden of proof nor require the possessing defendant to testify or come forward with evidence.

(3) In a conspiracy case, where the inferences arising from possession are involved, the court must make it clear that the jury cannot impute the possession of one conspirator to another, and that the inferences can be

drawn only against those particular defendants who are found by the jury to have had possession, either actual or constructive. The Court held for error in the instructions, BAGBY is entitled to a new trial. at page 929

In the instant case the court's instructions were even more damaging than in BAGBY, since in BAGBY the Court reasoned that because the jury found all defendants guilty of the substantive offense, they must have found that each of them had the requisite knowledge of illegal importation or such possession of the narcotics as to justify the statutory inference. Where as in this case the substantive Count is the Section 174 charge.

In any event, the defect in such a contention is a finding that a defendant knew that the heroin was imported implies a finding that it was imported. The converse, however, is not true, and that defendant asserts, is the vice in the instruction. And it follows that the jury was never told that the possession of conspirator A, if established, cannot be imputed to conspirator B for the purpose of permitting the statutory inferences of importation and knowledge of importation to be drawn against conspirator B.

CONCLUSION

For the reasons hereinabove set forth, and in reliance on the authorities cited herein, defendant respectfully submits that the judgement of conviction should be reversed, and the sentence imposed vacated.

Respectfully submitted,

Anthony Baratta

Anthony Baratta, pro/se

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THAT THE PETITIONER HAS MAILED A TRUE
COPY OF THE FOREGOING PETITION TO EACH OF THE FOLLOWING RESPONDENTS:

1. U. S. Court of Appeal

Court Clerk

U. S. Court House

Foley Square

N.Y.C., N.Y.

2. The Assistant U.S. Attorney

U. S. Court House

Foley Square

N. Y. C., N.Y.

Anthony Baratta

PETITIONER, PRO SE
ANTHONY BARATTA #34416
PEMBROKE STATION
DANBURY, CONNECTICUT 06810

SUBSCRIBED AND SWORN TO BEFORE ME THIS 1 DAY OF MAY

Harold H. Pitman
NOTARY (CASE WORKER)

AUTHORITIES BY THE ACT OF JULY 7, 1908
& ADMINISTER OATHS (28 U.S.C. 2008)

CIVIL DOCKET
UNITED STATES DISTRICT COURT

73 ON. 5444

END SE

Form No. 106 Rev.

Jury demand date:

Filed MAR 27-74

JUDGE COOPER

TITLE OF CASE

ATTORNEYS

ANTHONY BARATTA

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent.

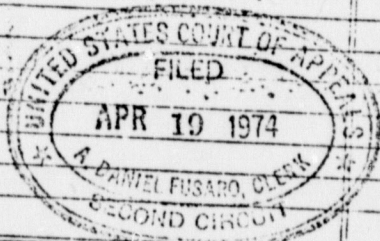
For plaintiff:

Anthony Baratta (Pro Se)

P.O. Box 1000

Lewisburg, Pa. 17837

For defendant:



STATISTICAL RECORD

COSTS

Filed <input checked="" type="checkbox"/>	Clerk
Filed <input checked="" type="checkbox"/>	Marshal
Action Motion to vacate	Docket fee
	Witness fees
se at:	Depositions

DATE

NAME OR RECEIPT NO.

REC.

12/19/73 Baratta
12/20/73 U.S. -
3/15/74 Baratta
4/15/74 Baratta

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15-148

Baratta vs. U.S.A.

73 CN. 5444

DATE	PROCEEDINGS	Date of Judgment
Dec. 21-73	Filed motion to vacate sentence. (64cr1148)	
Jan. 21-74	U.S. Dist. Ct. for S.D. N.Y. Denies motion in all respects. (64cr1148)	
Jan. 21-74	U.S. Dist. Ct. for S.D. N.Y. Denies motion in all respects. (64cr1148)	
Feb. 28-74	Filed Govt's Affidavit in Opposition to motion to vacate sentence.	
Feb. 28-74	Filed Govt's Memo. of Law in support of Opposition.	

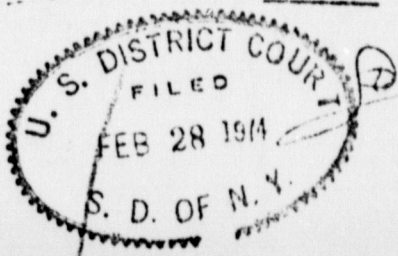
A TRUE COPY
RAYMOND P. BURCHARDT, CLERK
By *[Signature]*

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ANTHONY BARATTA v. UNITED STATES OF AMERICA -
PRO SE 73 Civ. 5444

Petitioner, appearing pro se, moves pursuant to 28 U.S.C. §2255 for an order vacating a judgment of conviction entered against him. Along with three co-defendants, he was found guilty by a jury on both counts of a two-count indictment charging conspiracy to sell heroin and sale thereof in violation of 21 U.S.C. §173 and §174. He was sentenced to a term of imprisonment for five years on the conspiracy count and a term of ten years on the substantive count, sentences to run consecutively. His conviction was affirmed, United States v. Baratta, 397 F.2d 215 (2d Cir.), cert. denied, 393 U.S. 939 (1968). On May 14, 1969 petitioner's Rule 35 motion to reduce sentence was denied. He thereafter moved to vacate his conviction under 28 U.S.C. §2255; it was denied on March 29, 1973 and affirmed, United States v. Baratta, Docket No. 73-1724 (2d Cir. September 17, 1973).

Petitioner now brings another motion under §2255 challenging the validity of his conviction on three grounds. He contends first that the standards of Chimel v. California, 395 U.S. 752 (1969), in which the Supreme Court defined the permissible scope of a search incident to a lawful arrest, were violated by the federal agents who arrested him in 1964. Our Circuit Court has held, however, that Chimel is not retroactive, thus, its de-



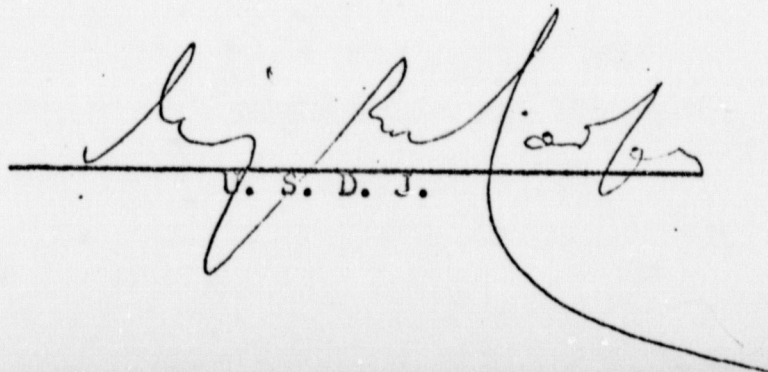
cision upholding the validity of the search now contested by petitioner is not subject to attack on this ground. United States v. Bennett, 415 F.2d 1113 (2d Cir. 1969); United States v. Ravich, 421 F.2d 1196 (2d Cir. 1970).

Petitioner's remaining two arguments concern the sufficiency of the evidence as to his control of the heroin and the trial court's charge to the jury. Both of these issues were raised by petitioner on appeal; both were rejected. United States v. Baratta, 397 F.2d 215, 225-227. Once a matter has been decided adversely to a defendant on direct appeal, it cannot be relitigated in a post-conviction collateral attack. Meyers v. United States, 446 F.2d 37, 38 (2d Cir. 1971).

Accordingly, petitioner's motion is denied in all respects.

SO ORDERED:

New York, N.Y.
February 26, 1974


U. S. D. J.

